SUPREME COURT, U. S. JAN 9 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

**Docket No. 1146**

SAUL STAMBLER and ROSE STAMBLER, individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING Co., Inc., and EMPIRE PARK INC., and ROSE STAMBLER on behalf of Empire Park Inc., (a defunct corporation),

*Petitioners,*

—against—

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

*Respondents.*

## BRIEF AND APPENDIX OF RESPONDENTS, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS AND GEORGE B. GORDON, IN OPPOSITION TO WRIT OF CERTIORARI

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*Respondents.*

## BRIEF AND APPENDIX OF RESPONDENTS, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS AND GEORGE B. GORDON, IN OPPOSITION TO WRIT OF CERTIORARI

### Questions Presented for Review

1. Whether petitioners' amended complaint states a complaint against respondents upon which relief can be granted?

2. Whether the respondents, Peter Wasylee, David Avstreih, Leonard Weiss and George B. Gordon, are entitled to summary judgment dismissing petitioners' amended complaint on the merits?

3. Whether a Writ of Certiorari should be granted herein where there are no special or important reasons therefor?

## Statement of the Case

The consolidated actions (1) Peter Wasylee, Plaintiff, v. Saul Stambler, Rose Stambler, Jack Jacobs, Prudential Operating Co., Inc., 8 & 11 Building Corp., Marcy Finke, individually, Marcy Finke, Herbert Tannenbaum, Dorothy Rubin, David Jacobs and Jack Hirsch, doing business as 8 & 11 Building Co., Empire Park, Inc., a domestic corporation which was dissolved, and Empire Park, Inc., a domestic corporation, Defendants; (2) Prudential Operating Co., Inc., Plaintiff, v. Peter Wasylee, 8 & 11 Building Corp., Cosmopolitan Equities, Inc., Cross-Thru Corporation, New England Mutual Life Insurance Co., Inc., The Great Atlantic & Pacific Tea Co., Inc., and Dorothy Rubin, Herbert Tannenbaum, Marcy Finke, David Jacobs and Jack Hirsch, d/b/a 8 & 11 Building Co., a co-partnership, Defendants; and (3) County Dollar Corporation, Plaintiff, v. Empire Park, Inc. and Peter Wasylee, Defendants, were tried before Mr. Justice John J. Dillon (a defendant herein) in the Supreme Court, Westchester County, for approximately nine days and resulted in a judgment entered in the County Clerk's Office of Westchester County on April 22nd 1965, which judgment determined title to a tract of real property located in Westchester County, and in addition thereto granted judgment for $15,106.30 to Peter Wasylee against the defendants, Saul Stambler, Rose

Stambler, Prudential Operating Co., Inc. and Empire Park, Inc. The present respondents, except respondent Mr. Justice John J. Dillon, were parties to the actions in Westchester County, or counsel therein, or witnesses or participants in real estate transactions involved in the actions.

The judgment of Mr. Justice John J. Dillon was unanimously affirmed on June 12th 1967, by the Appellate Division, Second Department. *Wasylec* v. *Stambler*, 28 A. D. 2d 825; *County Dollar Corp.* v. *Empire Park*, 28 A. D. 2d 822; *Prudential Operating Co.* v. *Wasylec*, 28 A. D. 2d 824; all three decisions reported at 282 N. Y. S. 2d 465.

Appeals were taken to the New York Court of Appeals, which, on November 2nd 1967, granted motions to dismiss the appeals. 20 N. Y. 2nd 893.

The notice of appeal stated that the appellants were "relying solely upon the questions directly involving the provisions of Article 1, Sections 1, 5, 6, 7 and 11 of the Constitution of the State of New York and Amendments Fifth, Thirteenth and Fourteenth, Sec. 1 of the Constitution of the United States and Title 42, Sec. 1994 of the United States Code. . . ." Chief Judge Fuld's order of dismissal states its ground to be "that no constitutional question is involved".

The summons and complaint in the within action were served upon the respondents on or about February 9th 1968. The original complaint, in effect, represented a broadside attack on the proceedings, trial, decision and judgment entered as a result of the trial that took place before Mr. Justice John J. Dillon in the Supreme Court, County of Westchester, State of New York.

The separate answers of the respondents consist of generally denying the allegations of the complaint and set forth a number of affirmative defenses. Such affirmative defenses generally consist of the following:

(a) Lack of jurisdiction based upon no federal jurisdiction.

(b) Lack of jurisdiction over the persons.

(c) Res adjudicata.

(d) Failure to state a cause of action.

The within action purports to be based on "Title 28 U. S. C., Sections 1331, 1332, and 1343; Title 42 U. S. C., Sections 1981, 1982, 1983, 1985, 1986, 1994, 2201 and 2202, as well as the Constitution of the United States, and in particular, the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments thereto". The theory of the action is that all of the respondents, under color of state law, engaged in a conspiracy to deprive petitioners of their property and violation of constitutionanal rights, and that was intended to be done, and was done by means of the rulings of Mr. Justice Dillon in the lawsuit, some of which were contrary to law and some of which were in excess of the jurisdiction of the New York Supreme Court in which Mr. Justice Dillon sat.

The petitioners herein are raising substantially the same constitutional questions that heretofore have been raised in the Supreme Court as the result of which the Court of Appeals of the State of New York dismissed the complaint "upon the ground that no constitutional question is involved".

The relief sought is the declaration of the state judgment as being void; an injunction against its enforce-

ment; and money damages (except as against Mr. Justice John J. Dillon).

A motion by petitioners for a preliminary injunction was denied by Judge William B. Herlands, with opinion, on March 28th 1968.

Judge John F. X. McGohey, by order with opinion filed July 13th 1968, directed summary judgment for the respondent, Mr. Justice J. Dillon.

Judge Charles Tenny, by order with opinion filed October 7th 1968, granted a motion by petitioners to amend the judgment entered on the order of Judge McGohey and for leave to serve an amended complaint.

Judge Tenney also dismissed the complaint as to the corporation petitioners since corporations cannot appear other than by an attorney at law and neither Rose nor Saul Stambler are attorneys at law.

Judge Inzer B. Wyatt, by order with opinion filed November 8th 1968, denied the application of the petitioners for an order directing one of the named respondents, Hon. John J. Dillon, to appear for the taking of his deposition on oral examination.

An amended complaint was filed by the petitioners on November 29th 1968.

The separate amended answers of the respondents consist of generally denying the allegations of the complaint and set forth a number of affirmative defenses. Such affirmative defenses generally consist of the following:

(a) Lack of jurisdiction based upon no federal jurisdiction.

(b) Lack of jurisdiction over the persons.

(c) Res adjudicata.

(d) Failure to state a cause of action.

All of the respondents moved to dismiss the action for failure of the amended complaint to state a claim upon which relief can be granted (Respondent's Appendix).

Judge William B. Herlands, by order with opinion filed June 23rd 1969, granted the motions of the respondents to dismiss the amended complaint.

By notice of motion dated June 30th 1969, the petitioners moved for an order pursuant to Rule 59 E of the Federal Rules of Civil Procedure to amend the order of Judge William B. Herlands filed June 23rd 1969, dismissing the amended complaint so as to permit the petitioners to amend the amended complaint pursuant to Rule 15 (A) of the Federal Rules of Civil Procedure, and for an order pursuant to Rule 26 (a) of the Federal Rules of Civil Procedure to take the testimony of the respondents, John J. Dillon. The motion was pending before Judge William B. Herlands when he died, and the matter was referred to Judge Inzer B. Wyatt by order of the Chief Judge, filed October 9th 1969.

Judge Inzer B. Wyatt, by order with opinion filed October 24th 1969, denied the application for the petitioners on the law and in the exercise of discretion.

*The petitioners filed a* notice of appeal dated November 1969, appealing from the judgment entered by Judge William B. Herlands on June 23rd 1969, dismissing the amended complaint in this action. An amended notice of appeal, dated December 8th 1969, was filed appealing from the judgment of Judge William B. Herlands entered on June 29th 1969, dismissing the amended complaint and appealing from the order of Judge Inzer B. Wyatt entered December 1st 1969, denying the motion to reargue petitioners' motion.

The matter came on for argument in the United States Court of Appeals for the Second Circuit on September 14th 1970, and a decision rendered on September 23rd 1970 affirming the judgment entered below dismissing appellants' (petitioners') complaint and the post-judgment orders denying appellants' (petitioners') post-judgment motions (A-B, 20, 21, 22).

## BRIEF

## POINT I

**The amended complaint does not state a cause of action against any of the respondents.**

Judge William B. Herlands in his opinion (Appendix to Petition, pages B-5 to B-12) dismissing petitioners' amended complaint, fully analyzed the complaint and set forth in detail all applicable authorities indicating that the amended complaint failed to state a claim against any of the respondents.

## POINT II

**The respondents, Peter Waslyec, David Avstreih, Leonard Weiss and George B. Gordon, are entitled to summary judgment dismissing petitioners' amended complaint on the merits.**

The application resulting in Judge Herland's opinion and judgment entered June 23rd 1969, dismissing petitioners' complaint (App. to Petition, p. 1250), was initiated, among other things; by notice of motion of the respondents, Peter Wasylee, David Avstreih and Leonard Weiss, dated December 19th, 1968, and the supporting

affidavit of Leonard A. Weiss, sworn to the 19th day of September, 1968. Petitioners elected not to submit any documents in opposition to said motion. The motion papers show that there was no conspiracy between the respondents to deprive petitioners of any of their rights, civil, constitutional or otherwise.

## POINT III

**A writ of certiorari pursuant to Rule 19 should not be granted in this matter.**

Rule 19 clearly sets forth the considerations governing review on certiorari, and it is submitted to the Court that the instant Writ in no way satisfies such Rule.

Respectfully submitted,

LOUIS J. MARTINO
*Counsel of Record for Respondents, Peter Wasylec, David Avstreih, Leonard Weiss and George B. Gordon*
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Mount Vernon, New York 10550

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LEONARD WEISS
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# APPENDIX OF RESPONDENTS, PETER WASYLEC DAVID AVSTREIH, LEONARD WEISS AND GEORGE B. GORDON

## Notice of Motion for Judgment on Pleadings

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

68 Civil Action

No. 537

SAUL STAMBLER
ROSE STAMBLER
EMPIRE PARK, INC. (a defunct corporation)
EMPIRE PARK, INC.
PRUDENTIAL OPERATING CO., INC.,

Plaintiffs,

—against—

JOHN J. DILLON
TITLE GUARANTEE CO.
PETER WASYLEC
MARCY FINKE
GEORGE B. GORDON
DAVID AVSTREIH
LEONARD WEISS
JOHN J. O'MALLEY
COUNTY DOLLAR CORPORATION,

Defendants.

Upon the annexed affidavit of Leonard A. Weiss, sworn to the 19th day of December, 1968, and the complaint in

this action, and the answers of the defendants, Peter Wasylec, David Avstreih and Leonard Weiss, and the amended complaint in this action, and the amended answers of the defendants, Peter Wasylec, David Avstreih and Leonard Weiss, all on file herein in the office of the Clerk of this Court, and upon the record on appeal in the consolidated State Court actions of *Wasylec v. Stambler, et al., Prudential Operating Co., Inc. v. Wasylec, et al.*, and *County Dollar Corporation v. Empire Park, Inc. and Peter Wasylec*, and upon all papers, pleadings and proceedings heretofore had herein, the undersigned will cross-move this Court at a Term for Motions thereof, to be held in the United States Court House, Room 506, Foley Square, Borough of Manhattan, City and State of New York, on the 14th day of January, 1969, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard:

(1) For judgment on the pleadings and dismissing the amended complaint in the above entitled action as against the defendants, Peter Wasylec, David Avstreih and Leonard Weiss.

(2) For an order granting summary judgment against the plaintiffs and in favor of the defendants, Peter Wasylec, David Avstreih and Leonard Weiss dismissing plaintiffs' amended complaint on the merits.

(3) For an order dismissing the plaintiffs' amended complaint on the further ground that no facts or pleadings in said amended complaint stating a claim for relief.

(4) For an order dismissing said amended complaint on the further ground that this court lacks jurisdiction

of the subject matter of this action, that the judgment of the Supreme Court of the State of New York, as unanimously affirmed by the Appellate Division of the Second Department of the State of New York, and upheld unanimously by the Court of Appeals of the State of New York, sought to be vacated and set aside, is res adjudicata of all of the matters set forth in the complaint, and not subject to review, modification or augmentur by this court.

(5) For an order dismissing the amended complaint on the further ground that this court does not have jurisdiction of the parties to this action by reason of lack of diversity of citizenship of the parties hereto.

(6) For such other and further and different relief as to this court may seem just and equitable under the circumstances.

Dated: December 19th, 1968.

Yours, etc.,

AVSTREIH, MARTINO & WEISS
Attorneys for Defendants Peter Wasylec, David Avstreih and Leonard Weiss
O. & P. O. Address
20 East First Street
Mount Vernon, New York

*Notice of Motion for Judgment on Pleadings*

**To:**

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80 Centre Street
New York, New York

DANIEL GOLDBERG, Esq.
Attorney for Defendant, George B. Gordon
51 Madison Avenue
New York, New York

JOHN J. BOYLE, Esq.
Attorney for Defendants County Dollar Corporation, The Title Guarantee Company and John L. O'Malley sued herein as John J. O'Malley
120 Broadway
New York, New York

## Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion

UNITED STATES DISTRICT OFFICE

SOUTHERN DISTRICT OF NEW YORK

---

SAUL STAMBLER
ROSE STAMBLER
EMPIRE PARK, INC. (a defunct corporation)
EMPIRE PARK, INC.
PRUDENTIAL OPERATING CO., INC.,

Plaintiffs,

—against—

JOHN J. DILLON
TITLE GUARANTEE CO.
PETER WASYLEC
MARCY FINKE
GEORGE B. GORDON
DAVID AVSTREIH
LEONARD WEISS
JOHN J. O'MALLEY
COUNTY DOLLAR CORPORATION,

Defendants.

---

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

LEONARD A. WEISS, being duly sworn, deposes and says:

1. That he is an attorney at law, duly licensed to practice in the highest court of this State; that he has

*Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion*

been admitted to practice before this Court; that he is a member of the firm of Avstreih, Martino & Weiss, attorneys at law, with offices at 20 East First Street, City of Mount Vernon, County of Westchester, State of New York.

2. That he is a named defendant in the within action (paragraph 6, page 6 of the complaint). That the named defendant, David Avstreih (paragraph 5, page 6 of the complaint), is one of his law partners.

3. That his firm has, for some years, represented the named defendant, Peter Wasylec, in various matters and represents such defendant in connection with the within action.

4. That he is fully familiar with this matter, having been in charge of the litigation leading thereto, and submits this affidavit in support of a motion for judgment on the pleadings dismissing the complaint as to the defendants, Peter Wasylec, David Avstreih and Leonard Weiss.

5. The consolidated actions, *Wasylec* v. *Stambler*, *Prudential Operating Co., Inc.* v. *Wasylec* and *County Dollar Corporation* v. *Empire Park, Inc.*, were tried before Mr. Justice John J. Dillon (a defendant herein), in the Supreme Court, Westchester County, for approximately nine days, and resulted in a judgment entered in the County Clerk's Office on April 22nd 1965, which judgment determined title to a tract of real property located in Westchester County, and in addition thereto granted judgment for $15,706.30 to Peter Wasylec against the

*Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion*

defendants, Saul Stambler, Rose Stambler, Prudential Operating Co., Inc. and Empire Park, Inc.

6. The Court will note that neither your deponent nor his law partner, David Avstreih, were parties in such Supreme Court action but merely represented, as attorneys, Peter Wasylec and Cross-Thru Corporation, a corporation solely owned and controlled by Peter Wasylec.

7. The summons and complaint in the within action were served upon the defendants, Peter Wasylec, David Avstreih and Leonard Weiss on February 5th, 1968. The complaint, in effect, represents a broadside attack on the proceedings, trial, decision and judgment entered as a result of the trial that took place in the Supreme Court, State of New York, County of Westchester.

8. It is most respectfully pointed out to this Court that the complaint in the within action fails to set forth that the judgment entered on April 22nd, 1965 was unanimously affirmed on appeal by the defendants in that action (the plaintiffs herein) to the Appellate Division of the Supreme Court, Second Judicial Department, by its order dated and entered on June 12th, 1967. The complaint likewise fails to state that the appeal from such judgment of affirmance to the Court of Appeals of the State of New York was dismissed by order of the Court of Appeals dated November 2nd, 1967 "upon the ground that no constitutional question is involved". The notice of appeal from the New York Supreme Court, Appellate Division, Second Department, relied "solely upon the questions directly involving the provisions of Article 1,

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Sections 1, 5, 6, 7 and 11 of the Constitution of the State of New York and Amendment Fifth, Thirteenth and Fourteenth, Section 1 of the Constitution of the United States and Title 42, Section 1994 of the United States Code".

9. The separate answer of the defendant, Peter Wasylee, as well as a separate answer on behalf of the defendants, David Avstreih and Leonard Weiss, were forwarded to the attorney for the plaintiffs herein on February 27th, 1967, the originals thereof, together with affidavit of service being simultaneously filed with this Court.

10. The answer of such defendants consists of generally denying the allegations of the complaint and sets forth four affirmative defenses. Such affirmative defenses consist of the following:

(a) Lack of jurisdiction based upon no federal jurisdiction.

(b) Lack of jurisdiction over the persons.

(c) Res adjudicata.

(d) Failure to state a cause of action.

11. The within action purports to be based on "Title 28 U. S. C., Sections 1331, 1332 and 1343; Title 42 U. S. C., Sections 1981, 1982, 1983, 1985, 1986, 1994, 2201 and 2202", as well as "The Constitution of the United States and in particular, the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments thereto".

*Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion*

12. In other words, the plaintiffs herein (as defendants in the Supreme Court) are raising substantially the same "constitutional questions" that heretofore have been raised in the Supreme Court, as a result of which the Court of Appeals of the State of New York dismissed the complaint "upon the ground that no constitutional question is involved".

13. That there have been numerous motions and decisions involved in this action to date, all of which are on file in this Court.

14. Judge McGohey by order with opinion filed July 13th, 1968, directed summary judgment for the defendant, Mr. Justice Dillon.

15. Judge Tenney by order with opinion filed October 7th, 1968, granted a motion by plaintiffs to amend the judgment entered on the order of Judge McGohey and for leave to serve an amended complaint.

16. Judge Wyatt by order with opinion filed November 8th, 1968, considered an application by the plaintiffs for an order directing one of the named defendants, Honorable John J. Dillon, a Justice of the Supreme Court of the State of New York, to appear for the taking of his deposition on oral examination. The application was denied and Judge Wyatt said:

> "The present application is totally lacking in merit and is denied."

Judge Wyatt also remarked:

> "The explanation made above establishes that such motions as the present are harassment to all those

*Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion*

concerned. The plaintiffs are taking the time of judges of this court to deal with essentially frivolous matters to the prejudice of other litigants in this court. Plaintiffs are strongly advised to desist in such conduct. Continuance can only lead to the imposition of sanctions or the entry of an injunction against plaintiffs or both."

17. Thereafter, the plaintiffs, prepared, filed and served a notice of appeal dated November 29th, 1968, appealing to the United States Court of Appeals for the Second Circuit from the order and opinion denying the motion for an order to examine the defendant, Dillon, the same being the order referred to above as having been rendered by Judge Wyatt.

18. Thereafter, the plaintiffs prepared, filed and served what purported to be an amended complaint in this action, the same having been received by your deponent's firm on December 5th, 1968.

19. While the amended complaint is inartfully drawn, such amended complaint appears to allege that the defendants corruptly conspired in the State Court action with Mr. Justice Dillon before whom said consolidated actions were tried to obtain an improper judgment which violated plaintiffs' civil and constitutional rights and the Constitution of the United States.

20. The amended answers of the defendants, Peter Wasylec, David Avstreih and Leonard Weiss were prepared, filed and served on December 9th, 1968. Such amended answers consist of generally denying the alle-

gations of the complaint and set forth four affirmative defenses. Such affirmative defenses consist of the following:

(a) Lack of jurisdiction based upon no federal jurisdiction.

(b) Lack of jurisdiction over the persons.

(c) Res adjudicata.

(d) Failure to state a cause of action.

21. In reviewing the amended complaint, one must bear in mind that a number of decisions have already been rendered directed to the original complaint as well as other matters involved herein. Judge McGohey by order with opinion filed July 13th, 1968, directed summary judgment on behalf of Mr. Justice John J. Dillon. Judge Tenney by order with opinion filed October 7th, 1968, granted a motion by plaintiffs to amend the judgment entered on the order of Judge McGohey and for leave to serve an amended complaint. In such order Judge Tenney granted the motion to dismiss the complaint as to the corporate plaintiffs on the ground that such corporate plaintiffs were not now represented by attorneys, such dismissal being without prejudice to their rnewal at such time as said corporations were properly represented in this court. Despite this finding and admonition, and despite the fact that such corporate plaintiffs are not represented by attorneys, the amended complaint nevertheless requests relief on behalf of the corporate plaintiffs.

22. In permitting the individual plaintiffs to file an amended complaint, Judge Tenney said:

*Affidavit of Leonard A. Weiss, Annexed to Foregoing Notice of Motion*

> ". . . that this is the first such motion brought before this court . . ."

and indicated his thought that the individual plaintiffs should have additional opportunity to allege:

> ". . . with at least some degree of particularity overt acts which the defendants engaged in which were reasonably related to the promotion of the claimed conspiracy."

However, the amended complaint is simply a rehashing of the original complaint and does not contain one factual allegation to support the plaintiffs' claims. There are no facts alleged in the amended complaint to support the pleading and plaintiffs in this action can, in fact, supply no facts to support it.

23. It is also to be noted that Judge Wyatt by order with opinion filed November 8th, 1968, aptly characterized the nature of all of the proceedings taken herein by the individual plaintiffs to date.

LEONARD A. WEISS

Sworn to before me this
19th day of December, 1968

LOUIS J. MARTINO
Notary Public, State of New York
No. 60-2563300
Qualified in Westchester County
Commission Expires March 30, 1971